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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 254

WAYNE F. WOODRUFF,

Petitioner,

vs.

R. P. BALKCOM, JR., WARDEN, GEORGIA STATE PRISON, REIDSVILLE, GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT

HARRY M. WILSON,
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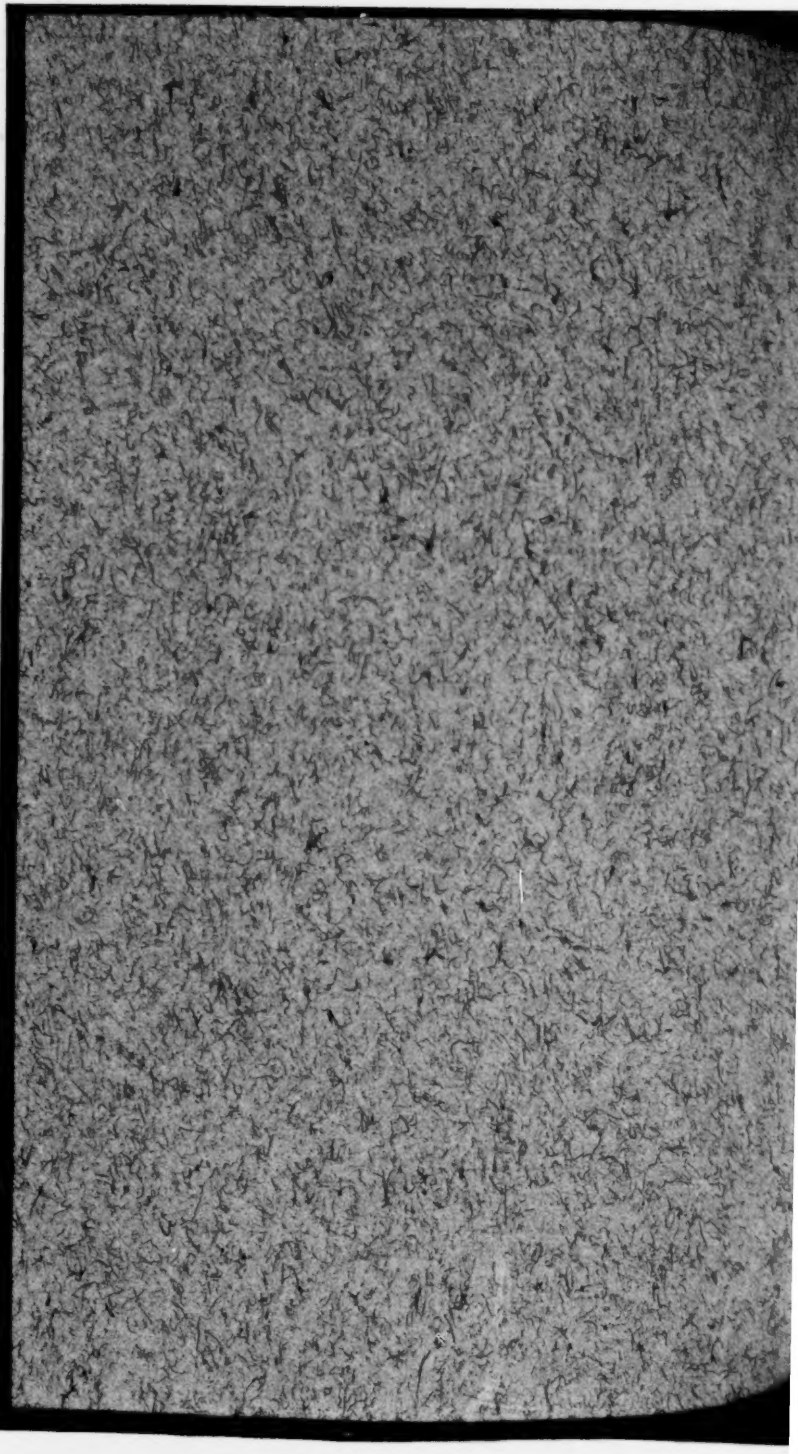

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT OF PETITION FOR WRIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Wayne F. Woodruff, respectfully moves this Honorable Court for permission to file the attached petition for certiorari and brief in support thereof pursuant to Title 28 U. S. C., Sections 1257 (3) and 2103, and Rule 38 of Revised Rules of the Supreme Court of the United States and respectfully prays that this Court issue the writ of certiorari as prayed for.

The petitioner is under sentence of death and seeks a hearing of his claim that his conviction, sentence and in-

carceration are the result of a denial of due process of law by the trial Court in Georgia and the Supreme Court of Georgia. He has been denied a hearing in the Superior Court of Tattnall County, Georgia, and in the Supreme Court of Georgia. Facts and argument in support of this motion are fully set forth in the petition and brief filed herewith.

HARRY M. WILSON,
HERBERT W. WILSON,
LEON A. WILSON II,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Supreme Court of Georgia, affirming a judgment of the Superior Court of Tattnall County, Georgia, denying petitioner a writ of habeas corpus.

PART ONE

Summary Statement of the Matter Involved

The record in this case consists of a certified transcript from the Supreme Court of Georgia, hereinafter designated as "Supreme Court Record."

This is an action for a writ of habeas corpus presented to Honorable Melville Price, Judge of the Superior Court of Tattnall County, Georgia.

The Petition for Writ of Habeas Corpus

The petition for writ of habeas corpus appears in Supreme Court Record, pages 2-10. The petition sets forth that the verdict, judgment and sentence of death by electrocution imposed upon petitioner by the Judge of the trial Court were illegal and void because petitioner was denied due process of law, in that the attorney who represented him in the lower Court was derelict in his duty and petitioner did not receive substantial representation, and was therefore denied a fair and impartial trial in violation of his rights under the Constitution of the United States.

The sole question in the case before the trial Court on trial of petitioner for murder was whether the shooting of the deceased by petitioner was an accident.

The weapon which caused the mortal wound was an automatic German Mauser pistol and petitioner's sole defense was that said shooting was accidental, caused by imperfect mechanical condition of said weapon, the safety device being broken.

Evidence substantiating these facts is set forth in Supreme Court Record, pages 4, 5, 6, 7. The statement of petitioner most emphatically bears out the fact that the shooting was an accident; he said "as I fired, the gun recoiled and I relaxed my grip and brings my arm back at the same time. My arm, I guess, was back about halfway from my body, and suddenly the gun fired again. I had relaxed my grip, and it almost went out of my hand." Supreme Court Record, page 4.

Petitioner alleged that an examination of said pistol by an expert would have demonstrated that said pistol was

in imperfect mechanical condition, and said attorney for petitioner was derelict in his duty because a gunsmith expert, A. L. Terbar, a witness sworn in behalf of the State, though he testified with reference to a rifle in said case, and the pistol was in Court at said time, petitioner's attorney did not cross-examine this expert in regard to the imperfect mechanical condition of said pistol. Supreme Court Record, page 5. Petitioner further alleged that counsel for petitioner was further derelict in his duty because had a test before the trial of said case been made counsel could have demonstrated from said test to the jury that said pistol being fired once could fire again accidently without any pressure being exerted on the trigger. Supreme Court Record, page 5.

Petitioner further alleged that petitioner's counsel was further derelict in his duty because there was a witness in Court who would have sworn that said pistol was in an imperfect mechanical condition prior to the shooting of the deceased. Supreme Court Record, pages 5, 6, 7. And petitioner's counsel could have further shown that said pistol was in a dangerous condition; that the safety on same was broken. Supreme Court Record, page 7.

Counsel for petitioner was further derelict in his duty because he did not even attempt to contradict evidence put in issue by the State with reference to flight of the defendant; because witnesses were available who would have testified that the trip to California and wedding of petitioner were known and discussed fully for at least thirty days prior to said shooting. Supreme Court Record, pages 7-8.

Counsel for petitioner was further derelict in his duty in not putting up witnesses showing the general good character of defendant, which witnesses were available and in Court, ready and willing to testify. Supreme Court Record, pages 6, 7, 8.

Although there were in Court witnesses to prove these facts not a witness was put on the stand by petitioner's counsel, nor evidence of any kind introduced; petitioner only making an unsworn statement in his own behalf.

That petitioner is a citizen of the United States and is at the present time unjustly and unlawfully detained and imprisoned at the Georgia State Prison by respondent under a sentence of death by electrocution pronounced by the Superior Court of Charlton County, Georgia, on October 10th, 1947, on the conviction of murder.

Petitioner alleged that the conviction was affirmed on appeal to the Supreme Court of Georgia on July 14th, 1948.

After the affirmance of said case, friends of petitioner employed new counsel who had nothing whatsoever to do with the case in the trial Court.

Thereafter, on January 15th, 1949, petitioner, by and through his present counsel, made application to Honorable Melville Price, Judge of Superior Court of Tattnall County, Georgia, for a writ of habeas corpus; writ was duly issued and a hearing set for January 29th, 1949. Between the date of the issuance of the writ and the hearing, petitioner was carried from Georgia State Prison to Folkston, Charlton County, Georgia, where he, being present, was resentenced by the Court. On the date of the hearing of the first application for writ of habeas corpus an amendment to the petition for writ of habeas corpus was offered and read to the Court. Before passing on the allowance of said amendment, the Court heard demurrer of respondent, and the question made in said first application having become moot, said amendment was disallowed and the said first application dismissed on demurrer; immediately after the dismissing of said first application and the disallowance of said amendment thereto, on the 29th day of January, 1949, a second application for the writ of habeas corpus, which second application embraced the same allegations as set

forth in the disallowed amendment to the first application, was presented to the Court and denied for the reasons set forth in order of the Court, Supreme Court Record, pages 10-11, without a hearing or the allowance of evidence introduced whatsoever, no demurrer to said second application being interposed by respondent.

Appeal was made to the Supreme Court of Georgia to the order of the Court denying a writ of habeas corpus on the second application, which judgment of the lower Court was affirmed by the Supreme Court of Georgia on May 10th, 1949. Supreme Court Record, pages 14-17.

Before the remittitur of the Supreme Court of Georgia had been made the judgment of the lower Court, petitioner made a request to the Supreme Court of Georgia for permission to add additional evidence to the record, which request was denied June 16th, 1949. Supreme Court Record, pages 18-22, 29.

A rehearing was asked which was denied by the Supreme Court of Georgia on June 16th, 1949. Supreme Court Record, pages 22-28, 30.

Judgment of the Superior Court

On the 29th day of January, 1949, when said second application for writ of habeas corpus was presented to the Court, it declined to sanction the petition and grant the writ; there being no demurrer to the petition or answer by respondent and no evidence was introduced by petitioner or respondent, and the Court gave as its reasons for declining to sanction the petition and grant the writ of habeas corpus the following:

> "There being no allegation in the above and foregoing petition that the alleged grounds incorporated therein were not known to the applicant or his counsel at the time the original petition for habeas corpus presented by the applicant and heard by the Court on this

date, which original petition was dismissed on demurrer filed by State's counsel, and

It further appearing that there are no allegations in this (second) petition that counsel who represented the applicant upon his trial and also upon his appeal to the State Supreme Court of Georgia was not employed by applicant and therefore of his own choosing (the fair inference being that said attorney was chosen by the applicant, as it could not be presumed reasonably that the Judge would have even considered the appointment of a non-resident counsel for the accused), and

It further appearing that no allegations appear in the petition (second) that any complaint of any kind was made known to the trial Court at any time during said trial, or thereafter, with reference to any alleged incompetency of his attorney, or with reference to any alleged denial of any right to which the applicant was entitled to during any stage of his trial

It is therefore ordered that the Court declines to sanction this petition.

At chambers, Ludowici, Ga., January 29 1949.

M. PRICE,
J. S. Cts. A. J. C. Ga."

Review of Decision of Court of Last Resort of Georgia

Petitioner has exhausted all of the judicial remedies available to him in the Courts of Georgia, and has not yet obtained a hearing on the allegations set forth in his petition for writ of habeas corpus, and this application for certiorari is made to review the judgment of the Supreme Court of Georgia, and the judgment of the Superior Court of Tattnall County, Georgia, the Supreme Court of Georgia being the highest Court of Georgia and the Court of last resort of Georgia.

Part Two

Jurisdictional Statement

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1257 (3), which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is contended that this Court has jurisdiction to review the judgment of the Supreme Court of Georgia because a Federal question of substance has been decided by the Supreme Court of Georgia (the judgment in this case) in a way not in accord with applicable decisions of this Court.

The judgment of the Supreme Court of Georgia holding that because a first petition for writ of habeas corpus was dismissed that a second petition for writ of habeas corpus, although on new and different grounds, could not be allowed, said judgment being contrary to decisions of this Court.

Homer C. Price v. *James A. Johnston, Warden,* 334 U. S. 66:

> "While a prior refusal to discharge a prisoner on habeas corpus is not without bearing when a later habeas corpus application raising the same issues is considered, a prior refusal has no bearing or weight

on the disposition to be made of a new issue raised on a subsequent application."

The Supreme Court of Georgia in its opinion, Supreme Court Record, page 17, headnote 3:

> "While the second petition for the writ of habeas corpus in this case is based upon grounds different from those in the first, from their very nature they were known to the applicant and to his present attorneys at the time of the filing of the first petition. The present application alleges no reason or excuse for the failure to include these grounds in the first."

In the request for permission to add additional evidence to the record, as the record did not fully disclose applicant's case, to the Supreme Court of Georgia, although denied, is set forth in the Supreme Court Record, page 18, a part of which is as follows:

> "On the 29th day of January, 1949, at Ludowici, Georgia, a hearing of the first application for writ of habeas corpus was sounded by Hon. Melville Price; immediately, an amendment was offered to the Court to the first petition for writ of habeas corpus; the amendment was read in its entirety to the Court and was disallowed by the Court on the 29th day of January, 1949, which amendment tendered embraced therein verbatim the allegations made in the second petition for writ of habeas corpus. A demurrer was then interposed to the first petition and was sustained and the first petition dismissed, because the questions therein raised had become moot at the date of the hearing." (Supreme Court Record, page 19.)

PART THREE

Questions Presented

I

WHETHER THE SECOND PETITION FOR WRIT OF HABEAS CORPUS SET FORTH SUFFICIENT ALLEGATIONS TO REQUIRE THE ISSUANCE OF THE WRIT, A RETURN BY THE RESPONDENT AND A HEARING THEREON.

II

WHETHER THE JUDGMENT OF THE SUPREME COURT OF GEORGIA MISAPPLIED THE DECISIONS OF THIS COURT TO THE FACTS OF THE CASE AT BAR.

III

WHETHER THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IN DETERMINING THE FEDERAL QUESTION INVOLVED IS CONTRARY TO THE DECISIONS OF THIS COURT.

IV

WHETHER PETITIONER, IN MAKING A SECOND APPLICATION FOR THE WRIT OF HABEAS CORPUS ABUSED HIS RIGHT IN THE USE OF SAID WRIT.

Reasons Relied on for the Allowance of the Writ

I. The second petition for writ of habeas corpus, setting forth sufficient facts to show that petitioner was convicted without a fair and impartial trial; that his attorney was derelict in his duty, that petitioner did not receive substantial representation, was deprived the benefit of counsel, presented a charge of denial of due process within the meaning of decisions of this Court:

Johnson v. *Zerbst*, 304 U. S. 458;
Powell v. *Alabama*, 287 U. S. 45;
In Re Swan, 150 U. S. 637;
Ex Parte Nielson, 131 U. S. 176;
In Re Wood, 140 U. S. 278;

In Re Moran, 203 U. S. 96;
Walker v. Johnson, 312 U. S. 275;
Whaley v. *Johnson,* 316 U. S. 101.

II. The Supreme Court of Georgia, in its opinion, based same especially upon two Federal decisions:

Wong Doo v. *United States,* 265 U. S. 239;
Swihart v. *Johnston,* 150 Fed. 2d 721.

Both of these cases are based on a petition for writ of habeas corpus covering same facts and substantially the same facts which had been embraced in former petitions for writ of habeas corpus and the petitions were filed a substantial time after the date of the filing of the prior petitions.

In each case the Court had previously sanctioned a petition for writ of habeas corpus and given the petitioner a hearing thereon on the merits of the case, and based its decision mainly on the ground that the subsequent petition covered the same grounds as the prior petitions which had been adjudicated upon the merits of the case. In the first petition filed by petitioner and which was dismissed on demurrer, the questions made therein had become moot and there never was an adjudication of the first petition on its merits, and petitioner had never had a legal hearing on the merits of his allegations either in the first or second petition. Furthermore, the ground in the second petition was entirely different from the allegations in the first, and in the opinion of the Supreme Court of Georgia they recognize this, for in its opinion, Supreme Court Record, page 17, in the third paragraph, it stated:

> "While the second petition for the writ of habeas corpus in this case is based upon different grounds from those in the first. * * *"

III. The judgment of the Supreme Court of Georgia affirming the refusal of the lower Court to sanction the second petition for writ of *habeas corpus* on the ground that a previous petition had been filed in the same Court on different grounds and allegations is contrary to the decisions of this Honorable Court. This Court holds that while a prior refusal to discharge a prisoner on *habeas corpus* is not without bearing when a later *habeas corpus* application *raising the same issues* is considered, a prior refusal has no bearing or weight on the disposition to be made of a *new issue* raised on a subsequent application.

Price v. *Johnston,* 334 U. S. 66;
Wong Doo v. *United States,* 265 U. S. 329;
Whaley v. *Johnston,* 316 U. S. 101.

IV. Counsel for petitioner recognizes the fact that the writ of *habeas corpus* is granted for the protection of its citizens and should in no case be used as a means of delay or to thwart justice.

Present counsel were not original counsel in the case in the trial Court. Petitioner's first petition for writ of *habeas corpus* was filed January 15th, 1949, and date of hearing on same was set for January 29th, 1949. On the date of hearing when case was sounded, petitioner offered an amendment to the first petition embracing the same grounds verbatim as were sought to be set up in the second petition for writ of *habeas corpus,* but as the allegations raised in the first petition had become moot because of the resentence of petitioner in the meantime, there was not such a petition pending as could be amended.

Feeling that the Court was correct in its refusal of the amendment, petitioner did not seek appeal, but without delay and on the same day, January 29th, 1949, presented

to said Court a second petition for writ of *habeas corpus*, which was denied without a hearing, to which denial an appeal was immediately taken and said case carried to the Supreme Court of Georgia.

Conclusion

WHEREFORE, It is respectfully submitted that this petition for writ of certiorari to review the judgment of the Supreme Court of Georgia should be granted.

HARRY M. WILSON,
HERBERT W. WILSON,
LEON A. WILSON II,
Attorneys for Petitioner,
Waycross, Georgia.

GEORGIA,
Ware County:

We, Harry M. Wilson, Herbert W. Wilson, and Leon A. Wilson, II, do solemnly swear that they are attorneys of record for Wayne F. Woodruff, petitioner in the foregoing petition for certiorari, and that the within and foregoing petition for certiorari is not filed in this case for the purpose of delay only, and we, as said attorneys, verily believe that Wayne F. Woodruff has good cause for certiorari; and we, as said attorneys, verily believe that they have good cause for certiorari; and that the facts in the foregoing petition, so far as they come within our own knowledge, are true, and so far as derived from the knowledge of others, we believe them to be true.

HARRY M. WILSON,
HERBERT W. WILSON,
LEON A. WILSON II.

Sworn to and subscribed before me, this 16th day of July, 1949.

J. CLEM HARDY,
Clerk, Superior Court,
Ware County, Georgia.

[SEAL.]

We certify that we have forwarded by due course of mail a copy of the motion for permission to file petition for certiorari and petition for certiorari in the case of Wayne F. Woodruff *v.* R. P. Balkcom, Jr., Warden of Georgia State Prison, certiorari to review judgment of Supreme Court of Georgia by the Supreme Court of the United States, to Honorable Eugene Cook, Attorney General of State of Georgia, second floor, State Capitol Building, Atlanta, Georgia, and to Honorable J. T. Grice, Assistant Attorney General of State of Georgia, Glennville, Georgia, attorneys for respondent.

This 16th day of July, 1949.

HARRY M. WILSON,
HERBERT W. WILSON,
LEON A. WILSON II,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 254

WAYNE F. WOODRUFF,

Petitioner,

vs.

R. P. BALKCOM, JR., WARDEN, GEORGIA STATE PRISON, REIDSVILLE, GEORGIA,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Opinion of Court Below

The opinion of the Supreme Court of Georgia in this case has not been reported officially, but the opinion appears in Supreme Court Record, pages 14-17.

Jurisdiction

I

The jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1257 (3), which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the

Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

II

The date of judgment in the Superior Court of Tattnall County, Georgia, is January 29th, 1949. Supreme Court Record, pages 10-11. The date of judgment of the Supreme Court of Georgia affirming the judgment of the Superior Court of Tattnall County, Georgia, is May 10th, 1949. Supreme Court Record, page 17. The date of judgment of Supreme Court of Georgia denying motion for a rehearing is June 16th, 1949. . Supreme Court Record, page 30. The date of judgment of Supreme Court of Georgia denying request for permission to add additional evidence to the record is June 16th, 1949. Supreme Court Record, page 29.

III

That the nature of the case and rulings below bring the case within the jurisdictional provisions of Title 28, U. S. Code, Section 1257 (3) appears from the following:

Petitioner raised, by a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia, a claim that his constitutional rights had been violated in that he was denied due process of law, for that the attorney who represented him in the lower Court was derelict in his duty and petitioner did not receive substantial representation, and was therefore denied a fair and impartial trial in violation of his rights under the Constitution of the United States.[1]

[1] The case of *Johnson* v. *Zerbst,* 304 U. S. 458, is one of a long line of cases sustaining the contention that a denial of substantial representation by counsel renders the conviction void as a violation of the Fourteenth Amendment.

Petitioner thereupon appealed the order denying to sanction the petition for writ of habeas corpus to the Supreme Court of Georgia, which judgment of the lower Court denying said petition was affirmed. Supreme Court Record, page 17.

Petitioner has exhausted all of the judicial remedies available to him in the Courts of Georgia, and has not yet obtained a hearing on the allegations set forth in his petition for writ of habeas corpus, the Supreme Court of Georgia being the highest Court and the Court of last resort of Georgia.

Inasmuch as petitioner has exhausted all other available judicial remedies and has no right to further appeal in his habeas corpus proceeding, this Court under Title 28 U. S. Code, Section 1257 (3) has power to issue writ of certiorari to review the judgment of the Supreme Court of Georgia.

IV

The following cases, among others, sustain the jurisdiction of this Court:

Twitchell v. *Philadelphia,* 7 Wall. 321.
Herndon v. *Georgia,* 295 U. S. 441.
Ashcraft v. *Tennessee,* 322 U. S. 143.

The above cited cases are authority for the proposition that Title 28 U. S. Code, Section 1257 (3) (then Section 344, Judicial Code) gives this Court the power to review, by certiorari, the decision of the highest Court and the Court of last resort of a State based on a federal question.

Statement of the Case

The facts of the instant case are set out in a petition for writ of certiorari submitted herewith, the allegations and details being set out in Supreme Court Record, pages 1-10, in the petition for writ of habeas corpus.

Briefly, the petition for habeas corpus sets forth that the verdict, judgment and sentence of death by electrocution imposed upon petitioner by the Judge of the trial Court were illegal and void because petitioner was denied due process of law, in that the attorney who represented him in the lower Court was derelict in his duty and petitioner did not receive substantial representation, and was therefore denied a fair and impartial trial in violation of his rights under the Constitution of the United States.

The sole question in the case before the trial Court on trial of petitioner for murder was whether the shooting of the deceased by petitioner was an accident.

The weapon which caused the mortal wound was an automatic German Mauser pistol and petitioner's sole defense was that said shooting was accidental, caused by imperfect mechanical condition of said weapon, the safety device being broken.

Evidence substantiating these facts is set forth in Supreme Court Record, pages 4, 5, 6, 7. The statement of petitioner most emphatically bears out the fact that the shooting was an accident; he said "as I fired, the gun recoiled and I relaxed my grip and brings my arm back at the same time. My arm, I guess, was back about halfway from my body, and suddenly the gun fired again. I had relaxed my grip, and it almost went out of my hand." Supreme Court Record, page 4.

Petitioner alleged that an examination of said pistol by an expert would have demonstrated that said pistol was in imperfect mechanical condition, and said attorney for petitioner was derelict in his duty because a gunsmith expert, A. L. Terbar, a witness sworn in behalf of the State, though he testified with reference to a rifle in said case, and the pistol was in Court at said time, petitioner's attorney did not cross-examine this expert in regard to the

imperfect mechanical condition of said pistol. Supreme Court Record, page 5. Petitioner further alleged that counsel for petitioner was further derelict in his duty because had a test been made before the trial of said case counsel could have demonstrated from said test to the jury that said pistol being fired once could fire again accidentally without any pressure being exerted on the trigger. Supreme Court Record, page 5.

Petitioner further alleged that petitioner's counsel was further derelict in his duty because there was a witness in Court who would have sworn that said pistol was in an imperfect mechanical condition prior to the shooting of the deceased. Supreme Court Record, pages 5, 6, 7. And petitioner's counsel could have further shown that said pistol was in a dangerous condition; that the safety on same was broken. Supreme Court Record, page 7.

Counsel for petitioner was further derelict in his duty because he did not even attempt to contradict evidence put in issue by the State with reference to flight of the defendant; because witnesses were available who would have testified that the trip to California and wedding of petitioner were known and discussed fully for at least thirty days prior to said shooting. Supreme Court Record, pages 7-8.

Counsel for petitioner was further derelict in his duty in not putting up witnesses showing the general good character of defendant, which witnesses were available and in Court, ready and willing to testify. Supreme Court Record, pages 6, 7, 8.

Although there were in Court witnesses to prove these facts not a witness was put on the stand by petitioner's counsel nor evidence of any kind introduced; petitioner only making an unsworn statement in his own behalf.

That petitioner is a citizen of the United States and is at the present time unjustly and unlawfully detained and im-

prisoned at the Georgia State Prison by respondent under a sentence of death by electrocution pronounced by the Superior Court of Charlton County, Georgia, on October 10th, 1947, on the conviction of murder.

Petitioner alleged that the conviction was affirmed on appeal to the Supreme Court of Georgia on July 14th, 1948.

After the affirmance of said case, friends of petitioner employed new counsel who had nothing whatsoever to do with the case in the trial Court.

Thereafter, on January 15th, 1949, petitioner, by and through his present counsel, made application to Honorable Melville Price, Judge of Superior Court of Tattnall County, Georgia, for a writ of habeas corpus; writ was duly issued and a hearing set for January 29th, 1949. Between the date of the issuance of the writ and the hearing, petitioner was carried from Georgia State Prison to Folkston, Charlton County, Georgia, where he, being present, was resentenced by the Court. On the date of the hearing of the first application for writ of habeas corpus an amendment to the petition for writ of habeas corpus was offered and read to the Court. Before passing on the allowance of said amendment, the Court heard demurrer of respondent, and the question made in said first application having become moot, said amendment was disallowed and the said first application dismissed on demurrer; immediately after the dismissing of said first application and the disallowance of said amendment thereto, on the 29th day of January, 1949, a second application for the writ of habeas corpus, which second application embraced the same allegations as set forth in the disallowed amendment to the first application, was presented to the Court and denied for the reasons set forth in order of the Court, Supreme Court Record, pages 10-11, without a hearing or the allowance of evidence introduced whatsoever, no demurrer to said second application being interposed by respondent.

Appeal was made to the Supreme Court of Georgia to the order of the Court denying a writ of habeas corpus on the second application, which judgment of the lower Court was affirmed by the Supreme Court of Georgia on May 10th, 1949. Supreme Court Record, pages 14-17.

Before the remittitur of the Supreme Court of Georgia had been made the judgment of the lower Court, petitioner made a request to the Supreme Court of Georgia for per mission to add additional evidence to the record, which request was denied June 16th, 1949. Supreme Court Record, pages 18-22, 29.

A rehearing was asked which was denied by the Supreme Court of Georgia on June 16th, 1949. Supreme Court Record, pages 22-28, 30.

Questions Presented

I

WHETHER THE SECOND PETITION FOR WRIT OF HABEAS CORPUS SET FORTH SUFFICIENT ALLEGATIONS TO REQUIRE THE ISSUANCE OF THE WRIT, A RETURN BY THE RESPONDENT AND A HEARING THEREON.

II

WHETHER THE JUDGMENT OF THE SUPREME COURT OF GEORGIA MISAPPLIED THE DECISIONS OF THIS COURT TO THE FACTS OF THE CASE AT BAR.

III

WHETHER THE JUDGMENT OF THE SUPREME COURT OF GEORGIA IN DETERMINING THE FEDERAL QUESTION INVOLVED IS CONTRARY TO THE DECISIONS OF THIS COURT.

IV

WHETHER PETITIONER, IN MAKING A SECOND APPLICATION FOR THE WRIT OF HABEAS CORPUS ABUSED HIS RIGHT IN THE USE OF SAID WRIT.

Errors Relied On

I

THE SUPERIOR COURT OF TATTNALL COUNTY, GEORGIA, ERRED IN REFUSING TO ISSUE THE WRIT ON THE SECOND PETITION, IN FAILING TO REQUIRE A RETURN BY RESPONDENT AND IN FAILING TO HAVE A HEARING ON THE ISSUES RAISED IN THE SECOND PETITION FOR WRIT OF HABEAS CORPUS.

II

THE SUPREME COURT OF GEORGIA ERRED IN ITS JUDGMENT IN MISAPPLYING THE DECISIONS OF THIS COURT TO THE FACTS OF THE CASE AT BAR.

III

THE SUPREME COURT OF GEORGIA ERRED IN DETERMINING THE FEDERAL QUESTION INVOLVED CONTRARY TO THE DECISIONS OF THIS COURT.

IV

THE SUPREME COURT OF GEORGIA ERRED IN HOLDING THAT PETITIONER IN MAKING A SECOND APPLICATION FOR THE WRIT OF HABEAS CORPUS ABUSED HIS RIGHT IN THE USE OF SAID WRIT.

ARGUMENT

I

The Superior Court of Tattnall County, Georgia, erred in refusing to issue the Writ on the Second Petition, in failing to require a return by Respondent and in failing to have a hearing on the issues raised in the Second Petition for Writ of Habeas Corpus.

As there was not a hearing on the second petition for writ of habeas corpus before the Superior Court of Tattnall County, Georgia, this Court must assume that petitioner's allegations are true.

In the cases of *White* v. *Ragen*, 324 U. S. 760, and *Williamson* v. *Kaiser*, 323 U. S. 471, where the Supreme Court of Illinois dismissed habeas corpus petition without requir-

ing an answer, the United States Supreme Court held that it must assume that petitioner's allegations were true.

The statute controlling the procedure to be followed when a petition for writ of habeas corpus is filed states:

> "A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained. . . .
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require." Title 28 U. S. Code, Section 2243.

This Court, upon review of the case of *Walker* v. *Johnson*, 312 U. S. 275, after setting forth that the only acceptable procedure under the statute is to grant the petitioner a hearing on the facts, stated:

> "Nothing less (than a hearing) will satisfy the command of the statute that the judge shall proceed to determine the facts of the case by hearing the testimony and arguments" (312 U. S. 285). (Matter in parentheses ours.)

This Court further said in commenting upon the failure of the district judge to grant petitioner a hearing in that case:

> "The Government properly concedes that if the petition, the return, and the traverse raise substantial issues of fact it is the petitioner's *right* to have those issues heard and determined in the manner the statute prescribes" (312 U. S. 275, 285.) (Italics ours.)

In *Holiday* v. *Johnston*, 313 U. S. 342, a petition for writ of habeas corpus was filed, an order to show cause issued

and a return thereto received by the Court and a traverse filed by petitioner. The matter was then referred to a commissioner of the Court for hearing. Upon receipt of the commissioner's report, argument thereon was heard by the district judge and the writ discharged. In commenting upon this divergence from the procedural requirements of the statute, this Court stated:

> "We cannot sanction a departure from the plain mandate of the statute on any of the grounds advanced. We have recently emphasized the broad and liberal policy adopted by Congress respecting the office and use of the writ of habeas corpus in the interest of the protection of individual freedom to the end that the very truth and substance of the cause of a persons' detention may be disclosed and justice be done. The Congress has seen fit to lodge in the judge the duty of investigation. One of the essential elements of the determination of the crucial facts is the weighing and appraising of the testimony. Plainly it was intended that the prisoner might invoke the exercise of this appraisal by the judge himself." (313 U. S. 342, 351)

The opinion further stated:

> "In summary, we hold that the provisions of the habeas corpus act, as embodied in the Revised Statutes, are too plain to be disregarded for any of the reasons advanced. The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the judge, which the statute plainly accords him." (313 U. S. 342, 353)

The same general rules and provisions applicable to habeas corpus proceedings in the United States Courts apply to habeas corpus proceedings in the State of Georgia,

because in Section 50-103 of the Code of the State of Georgia, it states:

> "The petition must be verified by the oath of the applicant or some other person in his behalf, and may be presented to the Judge of the Superior Court of the Circuit where the illegal detention exists, who may order the party restrained of his liberty to be brought before him from any county in his circuit; or it may be presented to the Ordinary of the County."

Section 50-104 of the Code of Georgia of 1933:

> "When writ must be granted. If upon examination of the petition it shall appear to the judge that the restraint of liberty is illegal, he shall grant the writ of habeas corpus, requiring the person thus restraining the liberty of another, or illegally detaining another in his custody, to bring such person before him, at a time and place to be specified in the writ, for the purpose of an examination into the cause of detention."

Section 50-105 of the Code of Georgia of 1933:

> "Penalty for refusing the writ. Whenever any person shall apply for a writ of habeas corpus to a judge whose duty it is to grant it, and it shall be refused, such judge shall forfeit to the party aggrieved the sum of $2500.00 to be recovered in any Court of law in this State having jurisdiction thereof."

And only may a judge decline to grant a writ without being subject to penalty, when it plainly appears from the petition that there is no legal ground for the writ.[2]

Therefore, the allegations of petitioner in his second petition for writ of habeas corpus must be taken as true that petitioner, in the dereliction of duty of his counsel, failed to receive substantial representation, thereby being

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[2] *Jones* v. *Hill,* 17 Ga. App. 151 (1), 87 S. E. 755.

deprived of a fair and impartial trial, benefit of counsel and due process of law in violation of his rights under the Constitution of the United States.

II

The Supreme Court of Georgia Erred in Its Judgment in Misapplying the Decisions of This Court to the Facts of the Case at Bar

In the case of *Wong Doo* v. *United States,* 265 U. S. 329, this Court stated:

> "1. The doctrine of res judicata does not apply in case of a second writ of habeas corpus to release one from custody, although it is filed in the same court as the preceding writ.
>
> 2. In case the same ground for discharge is set up in a second petition for a writ of habeas corpus that was set up in the first one, the court should give the ruling denying the writ in the first case controlling effect, although proof was not in fact offered in support of it in the former case."

In the third headnote of the opinion of the Supreme Court of Georgia, Supreme Court Record, page 17, that Court said:

> "That the second petition for the writ of habeas corpus in this case is based upon different grounds from those in the first . . ."

Therefore, where the grounds in the petition for writ of habeas corpus are not the same in the second petition as were in the first petition the above cited case would not be applicable.

In the case of *Swihart* v. *Johnston,* 150 Fed. 2d 721 (3) the Court stated:

> "Where petitioner's first petition for habeas corpus to secure discharge from imprisonment alleged that

petitioner's detention was unlawful because judgment under which he was detained was void and such petition was denied, second petition for same relief based upon same grounds was addressed to sound judicial discretion of Court and, in the exercise of that discretion, court properly gave controlling weight to judgment on first petition."

This case, we contend, is inapplicable and the Supreme Court of Georgia misapplied the law in said case to the facts.

In the above cases cited there had been a first application alleging the identical grounds for discharge as were later alleged in a second petition for writ of habeas corpus.

The grounds alleged in petitioner's first petition for writ of habeas corpus were entirely different from those set forth and alleged in petitioner's second application for writ of habeas corpus. First petition, Supreme Court Record, page 13; second petition, Supreme Court Record, pages 1-11.

III

The Supreme Court of Georgia Erred in Determining the Federal Question Involved Contrary to the Decisions of This Court

The judgment of the Supreme Court of Georgia in deciding the federal question that petitioner had been denied due process of law under the Constitution of the United States held contrary to the decisions of this Court.[3]

In the case of *Price* v. *Johnston,* 334 U. S. 66, the Court said:

"While a prior refusal to discharge a prisoner on habeas corpus is not without bearing when a later habeas corpus application raising the same issues is

[3] *Price* v. *Johnston,* 334 U. S. 66; *Whaley* v. *Johnson,* 316 U. S. 101; *Dorsey* v. *Gill,* 148 Fed. 2d 859.

considered, a prior refusal has no bearing or weight on the disposition to be made of a new issue raised on a subsequent application."

In the case of *McDonald* v. *Swope*, 79 Fed. Supp. 30, quoting from page 32 as follows:

"There is no clearer case showing the wisdom of the decisions of this Court than in Price *v.* Johnston, 334 U. S. 66, in which it was said in the second place, even if it is found that petitioner did have prior knowledge of all the facts concerning the allegations in question, it does not necessarily follow that the fourth petition should be dismissed without further opportunity to amend the pleadings or without holding a hearing. If called upon, petitioner may be able to present adequate reasons for not making the allegation earlier, reasons which make it fair and just for the trial court to overlook the delay. The primary purpose of the habeas corpus proceeding is to make certain that a man is not unjustly imprisoned. And if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary or reasonable to deny him all opportunity of obtaining judicial relief."

IV

The Supreme Court of Georgia Erred in Holding That Petitioner in Making a Second Application for the Writ of Habeas Corpus Abused His Right in the Use of Said Writ

The record in this case will clearly show that petitioner in making a second application for the writ of habeas corpus did not abuse his right in the use of said writ.

Petitioner filed a first petition for writ of habeas corpus on the 15th day of January, 1949, on grounds as set forth in Supreme Court Record, page 13. By the act of the lower

court in resentencing petitioner on the 22nd day of January, 1949, Supreme Court Record, page 10, the questions raised in the first petition on the date of the hearing on January 29th, 1949, had become moot. On the date of the first hearing petitioner offered an amendment to said first petition embracing all and the same grounds and allegations as were set up in a second petition for writ of habeas corpus, which second writ for habeas corpus was denied by the Superior Court without any hearing whatever.

The record clearly shows that petitioner endeavored to assert his rights without any delay whatever. Had the amendment been allowed to the first petition, the case would have been tried before the Superior Court on the 29th day of January, 1949; the second petition was presented to the Superior Court on the 29th day of January, 1949, immediately after the amendment offered in the first case had been disallowed and a demurrer by respondent to the first petition had been sustained and the first petition dismissed.

Most of the authorities and the controlling authorities, we contend, hold that there is only an abuse in the use of the writ when the grounds alleged in one petition are the same as those alleged in a subsequent petition, and where there is a considerable period of time elapsing between the hearing of a first petition and a subsequent petition for writ of habeas corpus, none of which facts or conditions or time element are applicable to the petition in controversy denied by the Superior Court and affirmed by the Supreme Court of Georgia.

The Constitution of the United States is the bulwark of our nation and civilization. It is a great protecting arm which encompasses the rich and poor alike and shelters and protects either when their rights are denied in any substantial respect.

In the case of *Price* v. *Johnson,* 334 U. S. 66, the petitioner had been denied a hearing in the District Court on the grounds of abuse of the writ, but this Court said:

> "Whether the petitioner does or does not have any new information is a matter unrevealed by anything before us or before the Circuit Court of Appeals. It is a matter which should be determined in the first instance by the District Court. And it is one on which petitioner is entitled to be heard whether at a hearing or through an amendment or elaboration of his pleadings.
>
> Moreover, we do not believe that the burden was on the petitioner of affirmatively alleging in the first instance that he had acquired new information or that he had adequate reasons for not raising sooner the issue of knowing use of false testimony. It was enough if he presented an allegation and supporting facts which, if borne out by proof, would entitle him to relief."

A federal question was raised in the Superior Court; also in the appeal to the Supreme Court of Georgia. The Supreme Court of Georgia is the highest Court of the State and the Court of last resort in the State of Georgia.

Therefore, where a federal right is specially claimed in the State Court, the United States Supreme Court must inquire whether the right was denied, not merely in express terms, but also in substance and effect, and, if necessary, evidence must be examined. *Norris* v. *State of Alabama,* 294 U. S. 587.

Conclusion

Petitioner, Wayne F. Woodruff, has tried to assert and have determined rights denied him under the Fourteenth Amendment which have been denied by the Superior Court and the Supreme Court of Georgia.

We respectfully submit that this Court grant the writ of certiorari and reverse the judgment of the Supreme

Court of Georgia, affirming the denial of the Superior Court to grant the second petition for the writ of habeas corpus.

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We certify that we have forwarded by due course of mail a copy of the foregoing brief to Honorable Eugene Cook, Attorney General of State of Georgia, second floor, State Capitol Building, Atlanta, Georgia, and to Honorable J. T. Grice, Assistant Attorney General of State of Georgia, Glennville, Georgia, attorneys for respondent.

This 16th day of July, 1949.

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